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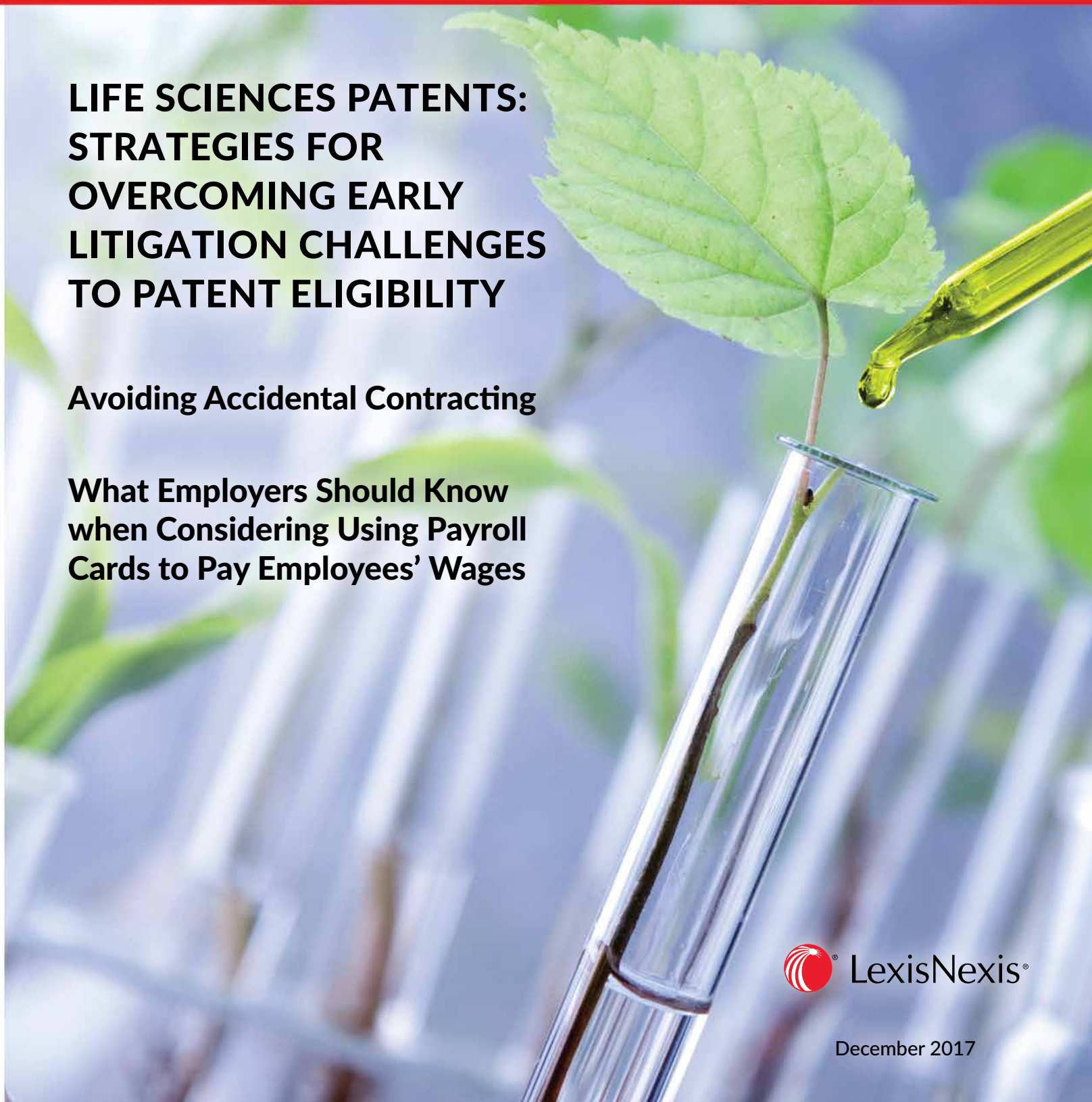

LIFE SCIENCES PATENTS: STRATEGIES FOR OVERCOMING EARLY LITIGATION CHALLENGES TO PATENT ELIGIBILITY

Avoiding Accidental Contracting

What Employers Should Know when Considering Using Payroll Cards to Pay Employees' Wages

DECEMBER 2017

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December 2017

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DECEMBER 2017


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The Changing Immigration Laws under the Trump Administration: A New Era for U.S. Immigration

Introduction

By all accounts, immigration was among the most debated issues of the 2016 presidential election. According to the Pew Research Center, 70% of registered voters listed immigration as "very important" to their vote in 2016. From the inception of his presidency, Donald Trump has made clear that the issue remains at the core of the administration's America First policy. As the president said in his inaugural speech:

> From this moment on, it's going to be America First. Every decision on trade, on taxes, on immigration, on foreign affairs, will be made to benefit American workers and American families. We must protect our borders from the ravages of other countries making our products, stealing our companies, and destroying our jobs. Protection will lead to great prosperity and strength. (Donald J. Trump, Inaugural Address (Jan. 20, 2017)).

This article describes the primary immigration actions of the administration that impact employers in the United States. This article will examine (1) President Trump's multiple travel bans, (2) H-1B and L-1 visa reform, (3) the Reforming American Immigration for a Strong Economy Act (RAISE Act), (4) extreme vetting and enhanced scrutiny of travelers, (5) Deferred Action for Childhood Arrivals (DACA) developments, and (6) the president's continuing immigration priorities.

Travel Bans

During the 2016 presidential campaign, then-presidential candidate Trump called for a "total and complete shutdown of Muslims entering the United States"[1] until U.S. authorities "can figure out what's going on." Following President Trump's inauguration on January 20, 2017, the administration moved quickly to enact travel restrictions and other policies in line with his campaign promises.

1. https://www.washingtonpost.com/news/post-politics/wp/2015/12/07/donald-trump-calls-for-total-and-complete-shutdown-of-muslims-entering-the-united-states/?utm_term=.5860d7783a80

Travel Ban 1.0 (E.O. 13769)

On January, 27, 2017, President Trump issued an executive order titled "Protecting the Nation from Foreign Terrorist Entry into the United States." 5 Exec. Order No. 13,769, 82 Fed. Reg. 8977 (Jan. 27, 2017) (EO-1). EO-1 included, among other things, a 90-day travel restriction on foreign nationals from seven countries (Iran, Iraq, Libya, Somalia, Sudan, Syria, and Yemen), a 120-day restriction on refugee admissions, an indefinite restriction on Syrian refugee admissions.

The U.S. Department of Homeland Security (DHS) immediately took enforcement steps, including detention of individuals from the affected countries upon their arrival in the United States at multiple airports across the nation and refusal of admission to approved refugees, non-immigrant (temporary) visa holders, and immigrant visa (green card) holders who were U.S. permanent residents. In many cases, officials removed these individuals to their countries of origin. While the executive order did not expressly define what it meant to be "from" one of these affected countries, DHS has said that this means nationals and citizens of the affected countries. See FAQ on Protecting the Nation from Terrorist Foreign Entry into the United States (July 21, 2017).[2]

On the same day, the U.S. Department of State issued an "Urgent Notice," advising that visa issuance for affected individuals had been suspended, effective immediately until further notification, and instructing those scheduled for visa interviews to not attend their visa appointments.

Challenging EO-1

In response to these government actions, multiple court actions were filed on January 28, 2017, through February 3, 2017, challenging the legality of the order and requesting emergency stays of the travel restrictions. These actions resulted in some temporary restraining orders prohibiting the detention and removal of foreign travelers with valid and non-immigrant visas. The administration clarified during this period that neither lawful permanent residents nor holders of third-country passports were covered by the executive order's 90-day travel restriction.

While the travel ban remained the subject of litigation, President Trump issued a second executive order to replace EO-1.

Travel Ban 2.0 (E.O. 13780)

President Trump signed a new executive order on March 6, 2017, restricting travel to the United States by certain individuals from six countries—Iran, Libya, Somalia, Sudan, Syria, and Yemen—for 90 days and placed a moratorium on worldwide refugee admissions for 120 days. 6 Exec. Order No. 13,780, 82 Fed. Reg. 13209 (Mar. 6, 2017) (EO-2). EO-2, titled "Protecting the Nation from Foreign Terrorist Entry into the United States," replaced and revoked EO-1, which was signed on January 27, 2017.

In contrast to the prior executive order, EO-2 included the following specific provisions relevant to the travel ban. Iraq was omitted from the six countries whose nationals would be subject to the 90-day travel ban. The 90-day ban was slated to take effect from March 16 through June 14, 2017. The travel ban expressly did not apply to U.S. citizens, lawful permanent residents, dual nationals, asylees, refugees previously admitted, government officials, and individuals with valid travel documents. The new order stated that the travel ban would apply to individuals from the six designated countries only if they (1) were outside the United States on March 16, 2017, (2) did not have a valid visa when EO-1 took effect, and (3) did not have a valid visa on March 16, 2017.

Additionally, officers could decide on a case-by-case basis to authorize issuance of a visa or permit entry of an individual to the United States who would be otherwise barred by the new executive order.

Challenging EO-2

Attorneys general for the states of Hawaii, New York, and Washington immediately announced challenges to President Trump's EO-2. The U.S. District Court for the District of Hawaii issued a nationwide order on March 15, 2017, blocking implementation of EO-2, which was scheduled to commence March 16. Among other injuries alleged by the plaintiffs, the court noted that the plaintiffs were "likely to succeed" on their allegation that the EO-2 violated the Establishment Clause of the First Amendment. Hawai'i v. Trump, 241 F. Supp. 3d 1119, 1140 (D. Haw. 2017). The U.S. District Court for the District of Maryland issued a similar decision, partially blocking implementation of EO-2 by enjoining, nationwide, Section 2(c) of EO-2. Section 2(c) would temporarily suspend for 90 days entry into the United States of certain nationals of the aforementioned six countries. Int'l Refugee Assistance Project v. Trump, 241 F. Supp. 3d 539, 560 (D. Md. 2017).

On May 25, 2017, a divided U.S. Court of Appeals for the Fourth Circuit, sitting en banc, substantially upheld the nationwide preliminary injunction against Section 2(c) of EO-2 issued by the District Court of Maryland. Int'l Refugee Assistance Project v. Trump, 857 F.3d 554 (4th Cir. 2017). On June 26, 2017, the U.S. Supreme Court announced that it would hear the

2. https://www.dhs.gov/news/2017/06/29/frequently-asked-questions-protecting-nation-foreign-terrorist-entry-united-states.

U.S. government's appeal from lower court orders enjoining EO-2. The Court granted the government's application to stay the injunctions "with respect to foreign nationals who lack any bona fide relationship with a person or entity in the United States," thus allowing the travel ban to proceed with respect to such individuals. However, the Court left in place the injunction barring implementation of EO-2 as it related to individuals who have a "bona fide relationship" with any individual or entity in the United States; as a result, EO-2 remained inoperative for the significant majority of affected individuals. The Supreme Court declined to define a "bona fide" relationship, leaving it subject to interpretation. Trump v. Int'l Refugee Assistance Project, 137 S. Ct. 2080 (2017).

On October 10, 2017, the Supreme Court dismissed as moot an appeal to hear EO-1, as the relevant provisions of EO-1 had expired. Trump v. Int'l Refugee Assistance Project, 2017 U.S. LEXIS 6265 (Oct. 10, 2017). On October 24, 2017, challenges to EO-2 were also dismissed because the March order had expired. Trump v. Hawai'i, 2017 U.S. LEXIS 6367 (Oct. 24, 2017).

Travel Ban 3.0

On September 24, 2017, President Trump issued a "Presidential Proclamation Enhancing Vetting Capabilities and Processes for Detecting Attempted Entry Into the United States by Terrorists or Other Public-Safety Threats" (EO-3). The proclamation imposed nationality-based travel restrictions as a result of the worldwide review conducted by the Secretary of Homeland Security, in consultation with the Secretary of State and the Director of National Security, pursuant to Section 2(b) of EO-2. The new country-specific restrictions would affect travel to the United States by nationals of Chad, Iran, Libya, North Korea, Somalia, Syria, Venezuela, and Yemen. Sudan, which had been included in EO-1 and EO-2, was removed from the list of restricted countries. The restrictions and limitations

COUNTRY NATIONALS	RESTRICTION
CHAD	Entry into the United States as immigrants and as business visitors (B-1) or tourists (B-2) is suspended indefinitely.
IRAN	Entry into the United States as immigrants and as non-immigrants is suspended indefinitely, except for students (F and M) and exchange visitors (J). Students and exchange visitors will be subject to enhanced screening and vetting requirements.
LIBYA	Entry into the United States as immigrants and as business visitors (B-1) or tourists (B-2) is suspended indefinitely.
NORTH KOREA	Entry into the United States as immigrants and as non-immigrants is suspended indefinitely.
SOMALIA	Entry into the United States as immigrants is suspended indefinitely. Non-immigrants will be subject to enhanced screening and vetting requirements.
SYRIA	Entry into the United States as immigrants and as non-immigrants is suspended indefinitely.
VENEZUELA	Entry into the United States of certain Venezuelan government officials and their immediate family members as business visitors (B-1) or tourists (B-2) is suspended indefinitely.
YEMEN	Entry into the United States as immigrants and as business visitors (B-1) or tourists (B-2) is suspended indefinitely.

contained in the proclamation were slated to take effect on October 18, 2017.

Unlike EO-1 and EO-2, the presidential proclamation incorporated an approach that, as noted in EO-3, was designed to be "tailored, as appropriate, given the unique conditions in and deficiencies of each country, as well as other country-specific considerations." The below chart summarizes these restrictions:

On October 17, 2017, U.S. district courts in Hawaii and Maryland enjoined EO-3 from taking effect on the following day. While the Supreme Court has dismissed both appeals from EO-1 and EO-2 because of mootness concerns, we do not know whether EO-3 will ultimately lead to a Supreme Court appeal.

Guidance for Employers

Although the latest travel ban has been enjoined, travelers can expect more scrutiny of their visa applications and more intense port of entry questioning. Accordingly, employers should:

- Provide clear and direct communications to their work corps, referring them to reliable sources for the specific parameters of the current vetting procedures.
- Make an employer hotline, such as an e-hotline, available for any urgent questions and ensure that travel reimbursement and authorization sources are linked into the hotline.
- Provide guidance to employees on port admission and customs clearance processes, including ensuring that they carry full paperwork on their visa status or, if they are business travelers, the propriety of their activity (e.g., a conference itinerary) and indication of its short-term duration (a round-trip ticket and employment/payroll obligations in the home country).
- Advise employees that because devices such as mobile phones, laptop computers, and tablets can be checked for social media activity and other data, archiving confidential data in advance of travel is wise
- Ensure that their leadership in human Resources (HR), global mobility, legal, and security stay informed on further restrictions and port practice developments.

H-1B and L-1 Visa Reform

During the 2016 presidential election, President Trump had also repeatedly campaigned for H-1B and other visa reforms. The administration has announced and carried out changes to two primary categories to date, the H-1B and L-1 visa programs.

- The H-1B visa program allows U.S. employers to sponsor foreign workers in specialty occupations requiring attainment of a bachelor's degree in the specific specialty or an equivalent combination of education, experience, and training. The H-1B program is limited to 65,000 new H-1B visas per year, with an additional allotment of 20,000 for individuals who have earned a U.S. advanced degree (master's or higher). New H-1B visa petitions are generally accepted six months in advance of the federal fiscal year—on about April 1 of each year.
- The L-1 visa program allows multinational employers to transfer executives and managers, L-1A, or individuals with specialized or advanced knowledge of the enterprise, L-1B, to related U.S. offices to contribute the fruits of their experience with the global enterprise. Qualifying employees must have at least one year of experience working for the global enterprise outside of the United States, with the one year of experience having been fulfilled during the three years preceding the requested L-1 period of admission. The foreign arm of the company at which they worked may be either a parent, subsidiary, affiliate, or branch, or in the case of a 50-50 joint venture, the transfer may occur between the joint venture and either partner.

January 23, 2017, Leaked Draft Executive Order (H-1B)

On January 23, 2017, a leaked draft of an executive order outlined sweeping reform for H-1B visas, including a merit-based process for selection of H-1B workers. As a result of the leak, many employers—including large IT and sourcing companies—became more selective in cases they agreed to file during the H-1B lottery. The administration never issued this order, however, and the FY 2018 H-1B lottery was administered precisely as in other years, according to a random selection of petitions filed within the first five working days of April 2017.

Pre-lottery Suspension of Premium Processing

On March 3, 2017, U.S. Citizenship and Immigration Services (USCIS), which reviews and adjudicates Form I-129 petitions, suspended premium processing for all H-1B petitions starting April 3, 2017. Employers rushed to file extensions by April 3 to avoid gaps in travel authorization or driver's licenses (as many states require proof of U.S. work authorization to issue license renewals) and stem anxiety of employees. On July 24, 2017, the agency lifted the suspension for certain H-1B cap-exempt petitions and on September 18, 2017, reinstated premium processing for H-1B visa petitions subject to the cap. USCIS resumed premium processing on October 3, 2017, for all H-1B "specialty occupation petitions, including initial filings, H-1B amendment, change-of-employer, and extension petitions."

THE EMPHASIS ON POTENTIAL WAGE DISPARITIES, MISREPRESENTED JOB DUTIES OR LOCATIONS, AND EXPERIENCE SHORTFALLS SIGNIFY A NOTABLE DEPARTURE FROM THE MORE STRAIGHTFORWARD AUDITS USCIS CONDUCTED IN THE PAST.

Changing Standard for H-1B Qualification for Entry-Level Positions

Further contributing to the confusion, in "Rescission of the December 22, 2000 'Guidance memo on H1B computer related positions,'" PM-602-0142, Mar. 31, 2017, (Policy Memorandum)—issued on the eve of the annual H-1B visa filing period, USCIS reversed a previously issued policy memorandum classifying all computer programming positions as specialty positions. The Policy Memorandum placed the burden on employers to prove that positions qualify for H-1B specialty occupation classification. The agency based its policy reversal largely on the fact that entry-level programmer positions do not consistently require attainment of a bachelor's degree or equivalent, which is a prerequisite for H-1B classification as a "specialty occupation."

While the policy expressly dealt with entry-level computer programmers, USCIS emphasized three points that heralded broader application of a more demanding standard for any occupation: (1) if a bachelor's degree in a precisely relevant specialty field is not the standard minimum for entry into the occupation, USCIS will not consider the occupation generally to meet the H-1B standards; (2) when an occupation does not generally qualify for H-1B classification, the employer must provide evidence to distinguish how its particular position meets the criteria for classification as a specialty occupation; and (3) if the wage level designation for the position is entry level, USCIS may consider this factor to signal that the position does not qualify as an H-1B specialty occupation. See USCIS, PM-602-0142 (Mar. 31, 2017).

USCIS Launches "American Workers First" Anti-Fraud Measures on the Day That the FY 2018 H-1B Filing Period Opens

USCIS announced five indicators of fraud and abuse, each of which supports its stated mandate to protect U.S. workers by preventing all employers from abusing the H-1B program by "decreasing wages and job opportunities [for Americans] as they import more foreign workers."[3] The indicators cited by USCIS include (1) the H-1B worker will not be paid the wage certified in the Labor Condition Application (LCA); (2) there is a wage disparity between the H-1B worker and other workers performing the same or similar duties, (3) the H-1B worker is not performing the duties specified in the H-1B petition, (4) the H-1B worker has less experience than U.S. workers in similar positions in the same company, and (5) the H-1B worker is not working in the intended location as certified on the LCA. The emphasis on potential wage disparities, misrepresented job duties or locations, and experience shortfalls signify a notable departure from the more straightforward audits USCIS conducted in the past.

Buy American and Hire American Executive Order

Following a series of reforms to the H-1B process, on April 18, 2017, President Trump signed the "Buy American and Hire American" Executive Order 13788 (E.O. 13788). E.O. 13788 addressed two aspects of the administration's policy: protection of U.S. jobs and preference for U.S.-manufactured products or goods.

> In order to create higher wages and employment rates for workers in the United States, and to protect their economic interests, it shall be the policy of the executive branch to rigorously enforce and administer the laws governing entry into the United States of workers from abroad, including section 212(a)(5) of the Immigration and Nationality Act (8 U.S.C. 1182(a)(5)).

E.O. 13788.

Hire American

With regard to U.S. jobs, E.O. 13788 directs the U.S. Departments of Labor, Justice, Homeland Security, and State to review employment-based foreign worker programs to "[e]nsure the integrity of the Immigration System in Order to 'Hire American'" and ensure that U.S. workers are provided with adequate protections from lower-cost foreign labor. E.O. 13788 calls for increased scrutiny and reform of existing non-immigrant worker programs, particularly the H-1B program.

E.O. 13788 directs the interagency group to do the following: (1) propose new rules and guidance as soon as practicable, and (2) review and reform the H-1B visa program to ensure that "H-1B visas are awarded to the most-skilled or highest-paid petition beneficiaries." The reforms herald adoption of merit-based allocation of annual visas to heighten wage and skills levels of H-1B workers.

3. See USCIS, *Combating Fraud and Abuse in the H-1B Program* (Apr. 3, 2017), https://www.uscis.gov/working-united-states/temporary-workers/h-1b-specialty-occupations-and-fashion-models/combating-fraud-and-abuse-h-1b-visa-program.

H-1B Impact to Date

The H-1B pool of filings decreased by 15% from the past two years, which seems to show that employers were more selective in their submission of petitions during the cap season. The government, in turn, has increased scrutiny over H-1B adjudications. Reports indicate a 45% increase in H-1B Requests for Evidence (RFEs) as compared to 2016. In particular, USCIS introduced aggressive H-1B RFEs questioning the sufficiency of H-1B petitions submitted with Level 1 wages and increased H-1B RFEs questioning relevancy of the degree to the specialty occupation (e.g., engineering or business for IT).

New USCIS Director's First Policy Memorandum Reverses Longstanding Policy to Defer to Previously Approved H-1B and L-1 Petitions

On October 23, 2017, USCIS released its first policy memorandum[4] under newly appointed Director L. Francis Cissna, by which USCIS eliminated a longstanding policy of deference in non-immigrant extension petitions. In 2004 and 2015 memoranda, USCIS had instructed reviewing officers to give deference to the findings of a previously approved petition as long as the key elements were unchanged and there was no evidence of a material error or fraud related to the prior determination. The updated policy guidance rescinds the previous policy.

In the announcement of the revised policy, the USCIS director noted that "USCIS officers are at the front lines of the administration's efforts to enhance the integrity of the immigration system. This updated guidance provides clear direction to help advance policies that protect the interests of U.S. workers."

Findings of DHS Report in USCIS Site Visits

On October 20, 2017, the DHS Office of Inspector General (OIG) submitted a report[5] summarizing its audit of USCIS's Administrative Site Visit and Verification Program (ASVVP), concluding that "USCIS site visits provide minimal assurance that H-1B visa participants are compliant and not engaged in fraudulent activity."

The report concluded that USCIS's ASVVP program had multiple shortfalls related to the limited number of site visits conducted, a lack of training, and a failure by inspectors to take proper action in instances where non-compliance is detected. The report further outlined a lack of agency tracking of visits, associated costs, and outcomes.

Among the DHS OIG recommendations, which USCIS "concurred with . . . and has begun corrective actions to address," are that USCIS should:

- Enhance tracking of H-1B site visit activity, including tracking of targeted site visits and program costs, as well as analysis of adjudicative actions resulting from the site visits. The report said that USCIS should then leverage this data to develop performance measures to assess the effectiveness of ASVVP and assist with oversight improvements.
- Further identify data and assessments obtained through ASVVP post-adjudication and implement measures to systematically share this information with external stakeholders.
- Assess ASVVP to determine the best allocation of resources, including adjustments to the number of site visits per year, random sampling procedures, and the time and effort spent on each site visit. To ensure consistent approaches and documentation for site visits, the report recommended that the assessment also should identify policies, procedures, and training requiring an update. The report further recommended developing a career path for site visit officers who wish to remain in investigatory positions.
- Develop comprehensive policies across USCIS to ensure adjudicative action is prioritized on fraudulent or noncompliant immigration benefits identified by the H-1B ASVVP and targeted site visits.

Site visits will be prioritized, with a more results-oriented and data-driven approach in the ASVVP program.

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4. https://www.uscis.gov/sites/default/files/USCIS/Laws/Memoranda/2017/2017-10-23Rescission-of-Deference-PM6020151.pdf 5. https://www.oig.dhs.gov/sites/default/files/assets/2017/OIG-18-03-Oct17.pdf

Guidance for Employers in View of These Developments

With the addition of a seasoned agency veteran, USCIS is poised to take multifaceted action to enforce its goals—eradication of fraud and abuse in the H-1B visa program. In light of this, employers should review each aspect of their visa programs: candidate selection, execution of visa filings, maintenance of compliance records, and monitoring of ongoing compliance. Key actions for employers to take include the following:

- Undertake a close review of how candidates are selected and the standards that the company requires to qualify for a visa. In the H-1B area, USCIS will consider low-wage or entry-level skill positions to be an indicator that the employer is abusing the system.
- Ensure that legal, HR, and global mobility all have a line of sight into the use of visas, and create escalation protocols that allow legal to monitor compliance.
- Consider adopting an integrity policy to demonstrate the company's commitment to appropriate use of the visa categories.
- If the company is placing its visa holders at customer sites, ensure that the direct management, supervision, and control of the workers is exclusively the domain of the company, not the customer. An audit trail that confirms this point is essential, and affirmation of that personnel authority and supervision should be maintained in the filing.
- When a material change occurs, include any site change outside of normal commuting distance in the H-1B arena, adhering to the amendment requirements in the regulations for each category. When in doubt, employers should consult with the company's experts on global mobility and outside counsel.
- When relying on third-party staffing of functions such as IT, use suppliers that are reliable and willing to certify their compliance with immigration and employment regulations. Employers should ensure that service agreements include the supplier's affirmation that it will only use subcontractors that are approved by the company and that supply similar certifications.

The RAISE Act and Its Effect on Employers

On August 2, 2017, President Trump announced his strong endorsement of the RAISE Act, 115 S. 1720, a bill introduced by Senators Tom Cotton (R-AR) and David Perdue (R-GA) that would slash annual overall immigration by half over 10 years. The RAISE Act seeks to implement extensive reform to the U.S. immigrant visa system, including replacing the current classification-based system with a merit-based points system.

Specifically, the RAISE Act would:

- Replace the employment-based immigrant visa system of the past 27 years with a merit-based selection process under which prospective immigrants would earn points based on education, English-language ability, high-paying job offers, age, extraordinary achievement, and high-value investment.
- Retain immigration preferences for the spouses and minor children of U.S. citizens and legal permanent residents while eliminating preferences for certain categories of extended and adult family members.
- Eliminate the Diversity Visa lottery program, which currently provides 50,000 green cards annually to citizens of countries historically underrepresented in the annual flow of immigrants to the United States.
- Place an annual limit of 50,000 on the number of refugees eligible to become permanent residents.

Due to the inherent unpredictability of selection, employers that wait to sponsor employees for permanent residency could lose valuable talent. The RAISE Act's points-based system would set a 30-point minimum threshold for qualification for an immigrant visa, and USCIS would offer immigrant visas twice yearly to the highest-scoring applicants. While specific details regarding visa application procedures remain unsettled, the legislation states that applicants not selected after 12 months would be required to reapply.

Potential Changes to the Annual H-1B Process

The RAISE Act provides an illuminating preview of how the Trump administration is likely to change the annual H-1B selection process. The Trump administration has emphasized a points-based system as a method of ensuring that the United States welcomes only the "best and brightest" foreign workers, and the RAISE Act's immigrant visa system accordingly could be adapted by the administration in furtherance of H-1B specialty occupation visa reform. In that instance, points-based selection would replace the current annual H-1B visa lottery, during which H-1B petitions are selected at random for processing. The RAISE Act echoes the "Buy American and Hire American" executive order, by which the president gave direction to his cabinet to "suggest reforms to help ensure that H-1B visas are awarded to the most-skilled or highest-paid petition beneficiaries."

Looking Ahead

Should the RAISE Act or a similar measure gain traction in Congress, employers may wish to consider sponsoring employees for immigrant visas before change takes effect. Early sponsorship would ensure that the applicants have the best possible opportunities for selection for an immigrant visa in the event of oversubscription, which is highly likely. In addition, however, it will be important for employers

to evaluate the impact of a points-based system on their recruitment and retention objectives and make their voice heard in the legislative debate.

Extreme Vetting and Enhanced Scrutiny of Travelers

In the first year of his term, President Trump and his administration took a number of steps to further his campaign promise to tighten U.S. border security. These efforts have included the travel bans discussed above, as well as extreme vetting measures designed to heighten scrutiny of U.S. visa applicants and inbound travelers.

Beginning February 2017, DHS, and in particular, Customs and Border Protection (CBP), began actively enforcing search policies that extend to "virtual briefcases"—including, but not limited to, electronic data contained on personal devices such as mobile phones, laptop computers, and tablets. The nature of these searches, including the fact that they are normally conducted without a search warrant or any other indication of suspicion, has raised concerns by members of Congress[6] and garnered media attention for their intrusiveness to travelers seeking to enter the United States. In the past, these types of searches, however, have been deemed generally permissible by the U.S. Supreme Court and were examined in detail in a 2009 Privacy Impact Assessment (PIA) prepared by DHS.[7]

The PIA states that border officers may conduct searches of electronic devices as part of agency goals to interdict and investigate violations of federal law as well as to prevent the admission of contraband or inadmissible persons into the United States. During the inspection process, travelers are subject to an examination to determine their admissibility into the United States and an examination of their belongings for evidence of contraband or criminal activity, without a warrant and without suspicion.

On March, 20, 2017, DHS announced that a new ban on certain types of electronics on international inbound flights to the United States would go into effect on March 21, 2017. The restrictions targeted flights leaving from majority-Muslim countries. Restricted items include electronics that are bigger than standard mobile telephones, including laptop computers, tablets, cameras, travel printers, and gaming devices. These restrictions were lifted by July 19, 2017, but the agency continues to exercise its practice of searching electronic devices under the PIA analysis.

DACA Developments

On September 5, 2017, the Trump administration announced the end of DACA. The DACA program has provided work and temporary residency authorization for nearly 800,000 beneficiaries who were brought with their families to the United States as children and meet several guidelines. DACA has allowed these young people—known as the Dreamers—to work and study in the United States free from the threat of deportation. It has been reported that over 97% of the beneficiaries are in the U.S. workforce or in school.

Related Content

For more information on the Deferred Action for Childhood Arrivals program, see

> DEFERRED ACTION FOR CHILDHOOD ARRIVALS (DACA): THE RESCISSION OF DACA AND THE IMPACT ON EMPLOYERS

RESEARCH PATH: *Labor & Employment > Business Immigration > Employment Eligibility Verification > Practice Notes*

For guidance on issues that immigration counsel must thoroughly review and examine before mergers or acquisitions occur, see

> IMMIGRATION LAW CONSIDERATIONS IN BUSINESS TRANSACTIONS

RESEARCH PATH: *Labor & Employment > Business Immigration > Employment Eligibility Verification > Practice Notes*

For a discussion on the key topics and best practices for an employer to consider when developing an immigration sponsorship policy, see

> BUSINESS IMMIGRATION SPONSORSHIP: KEY CONSIDERATIONS

RESEARCH PATH: *Labor & Employment > Business Immigration > Visas > Practice Notes*

For an overview of the main issues relating to H-1B Visas, see

> H-1B VISAS: SPECIALTY OCCUPATION NONIMMIGRANT VISAS

RESEARCH PATH: *Labor & Employment > Business Immigration > Visas > Practice Notes*

6. https://www.law360.com/immigration/articles/894172/senator-questions-border-electronics-searches?nl_pk=41764bf1-52dd-4391-970f-9928fc17040e&utm_source=newsletter&utm_medium=email&utm_campaign=immigration. 7. https://www.dhs.gov/sites/default/files/publications/privacy_pia_cbp_laptop.pdf.

According to the announcement, DACA would remain in place for nearly six months, until March 5, 2018. DHS would process initial requests for DACA and work authorization received on or before September 5, 2017, but would not accept new initial requests for DACA benefits after September 5, 2017. DHS would process applications for extension of DACA benefits from current beneficiaries whose benefits will expire on or before March 5, 2018, that had been accepted by DHS as of October 5, 2017. Thus, a current beneficiary whose DACA benefits will expire March 6, 2018, or later is ineligible to file for an extension.

DACA recipients with current work authorization will remain authorized to work until the expiration date on the employment authorization document (EAD) unless their status is revoked. Lastly, DHS will not approve any new applications for advance parole, although it will generally honor the validity period for previously approved applications for advance parole. Pending applications for advance parole will be administratively closed, and the fees will be refunded.

The six-month extension of the program is designed to give Congress an opportunity to pass legislation to protect DACA beneficiaries, putting the issue of protecting individuals brought to the United States as children back in the hands of Congress. Senator Susan Collins (R-ME) said she believes there is "widespread bipartisan support for legislation that would provide some measure of protection to children who are brought to this country through no decision of their own." If Congress is unable to pass a bill, President Trump has promised to "revisit this issue."

How Employers Should Respond

- Do not refuse to hire an applicant solely because they present a valid EAD that will expire in the future.
- Do not review I-9 records to validate which employees are DACA beneficiaries.
- In determining the length of approved work authorization, employers should rely exclusively on their I-9 records.
- Employers should make sure their I-9 recordkeeping is up-to-date and that they are properly reviewing their Section 3 reverification obligations.
- Be aware that each DACA case is distinct based on individual circumstances.

Immigration Policy Priorities

On October, 8, 2017, the Trump administration published a list of three immigration policy objectives to (1) ensure safe and lawful admissions, (2) defend the safety and security of the United States, and (3) protect American workers. The administration indicated in its statement that it is "ready to work with Congress" to meet these immigration policy priorities.

TWO ASPECTS OF [TRUMP ADMINISTRATION] POLICY OBJECTIVES MERIT CLOSE EVALUATION BY EMPLOYERS: AN EMPHASIS ON HEIGHTENED VISA FRAUD DETECTION CAPABILITIES AND THE DEVELOPMENT OF A POINTS-BASED SYSTEM TO MEASURE ELIGIBILITY OF FOREIGN NATIONALS FOR U.S. PERMANENT RESIDENCE.

The three main policy objectives—border security, interior enforcement, and a merit-based immigration system—align with earlier White House pronouncements, including the "Buy American, and Hire American" executive order and the statements accompanying its multiple travel bans. Two aspects of these policy objectives merit close evaluation by employers: an emphasis on heightened visa fraud detection capabilities and the development of a points-based system to measure eligibility of foreign nationals for U.S. permanent residence.

Measures to Enhance Visa Fraud Detection

The Trump administration's policy priorities identify multiple avenues of enhancing enforcement of U.S. immigration laws, including expansion of the Department of State's authority to collect and use fraud prevention and detection fees to combat visa fraud and enhanced funding of the Visa Security Program, especially at high-risk consular posts. In particular, the administration proposes strengthening the ability of the Department of State to detect and prevent fraud in the following ways:

- Expand the Department of State's authority to use fraud prevention and detection fees for programs and activities to combat all classes of visa fraud within the United States and abroad.
- Ensure funding for the Visa Security Program and facilitate its expansion to all high-risk posts.
- Grant the Department of State the authority to apply the Passport Security Surcharge to the costs of protecting U.S. citizens and their interests overseas and to include those costs when adjusting the surcharge.
- Strengthen laws prohibiting civil and criminal immigration fraud and encourage the use of advanced analytics to proactively detect fraud in immigration benefit applications.

The prioritization of visa fraud detection is a critical point for employers and their foreign national populations, as employers and employees should expect longer queues and increased security checks for visa benefits. The Trump administration's

prioritization of visa fraud detection and prevention aligns with recent changes announced by the administration, including the phase-in of in-person interviews for all employment-based applicants for permanent residence, including dependent family members, effective on October 1, 2017, for applications filed on or after March 6, 2017. Visa applicants may also find that consular officers will question their eligibility for a visa benefit even when an underlying visa petition has already been granted by DHS (e.g., for H-1B benefits).

Development of a Points-Based Immigration System

The Trump administration's prioritization of a points-based immigration system for employers aligns with the president's endorsement of the RAISE Act. Despite President Trump's support, implementation of a points-based immigration system would require congressional action and is unlikely to affect petitions and related submission filed under current US immigration laws.

Conclusion

Employers should expect the Trump administration to aggressively pursue its stated platform of immigration priorities, which include enacting policy and regulation to support the "Hire American" and extreme vetting proclamations of President Trump. In this environment, employers should closely review their visa programs to ensure that they are in compliance with changing standards and work to establish leadership for and a broad-based culture of compliance in this area. A focused assessment of potential alternative visa options and when and how employers sponsor candidates for permanent residency can help advance staffing goals. In addition, employers should evaluate the strength of their I-9 and E-Verify employment verification programs. In the merger and acquisition context, diligence over visa and I-9 issues is more important than ever. Similarly, employer diligence over the vendors they use, particularly for IT functions where H-1B and L-1 usage may be high, should be integrated into procurement contracts and vendor resource programs. As a final matter, keeping an open line of communication, with informed messaging being sent to the work corps, is essential. L

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